SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, Plaintiffs, -against- KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER, Defendants KESHA ROSE SEBERT p/k/a KESHA, Counterclaim Plaintiff, -against- LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC, KEMOSABE ENTERTAINMENT, LLC, KEMOSABE RECORDS, LLC, and SONY MUSIC ENTERTAINMENT, Counterclaim Defendants	Index No 653118/2014 Justice Shirley Kornreich Part 54. Motion Sequence No. 017 **(ORAL ARGUMENT REQUESTED)**

SUPPLEMENT TO DEFENDANT KESHA ROSE SEBERT'S MOTION FOR A PRELIMINARY INJUNCTION

Dated: New York, New York
October 30, 2015

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PRELIMINARY STATEMENT

Kesha Rose Sebert wants nothing more than to be able to record an album. Her only condition is that she be allowed to record with a record label that is not affiliated with someone who has emotionally and sexually abused her. Since the filing of her Motion,[1] she sought the permission of Sony Music Entertainment (RCA) to continue her contractual obligations to Sony but simply record with a label other than Kemosabe Records and affiliate Dr. Luke, as well as his companies, KMI and Prescription Songs. Sony said no. Sony and Dr. Luke took the position that either Kesha work with companies affiliated with someone she alleges date raped her or she watch the prime of her career disappear. The task for the Court on this Motion is not to resolve whether Kesha is right or Dr. Luke is right about the abuse. It is simply to allow Kesha to record (even for Sony) without having to work with Dr. Luke and his affiliated companies.

Kesha submits this supplemental brief because in a call with the Court on September 24, 2015, it became apparent that the record evidence was not clear. Just to make the record crystal clear, Kesha wrote letters to Sony and Dr. Luke requesting to record an album for Sony without Kemosabe, KMI, Prescription Songs, and Dr. Luke. The letters in response indicated both Sony and Dr. Luke believe the exclusivity clauses remain in effect, they will not agree to refrain from enforcement, and Sony specifically will not work with Kesha unless she agrees to work with Kemosabe and Dr. Luke's company, KMI. Kesha faces a grave risk of irreparable harm if she continues to be prevented from working, and she seeks an injunction prohibiting such interference with her career. Dr. Luke and his companies, meanwhile, may be adequately compensated with any damages should he ultimately prevail in the underlying lawsuit.

[1] On September 18, 2015, Kesha filed a motion for a preliminary injunction (hereinafter, the "Motion" or "Mot."), asking that the Court enter an order (1) enjoining all Counterclaim Defendants from interfering with Kesha's recording career, and (2) ordering Prescription Songs (Dr. Luke's publishing company) to issue all customary and necessary publishing licenses in connection with the release of Kesha's music. Mot. 16.

As the Court knows, Kesha's career is at a standstill. The contracts and exclusivity provisions (the "Agreements") that at one time bound Kesha to Dr. Luke and his companies can no longer be enforced against her, for reasons set forth in Kesha's Motion. Kesha is therefore legally free to work with anyone she chooses. But she cannot do so because other record labels and producers are aware that RCA, Dr. Luke, and his companies intend to enforce the exclusivity provisions. Their letters confirm that position. Third parties have therefore steered clear of Kesha, fearing that Dr. Luke and his companies will sue them for interfering or otherwise retaliate.

On October 6, 2015, Kesha's counsel sent a letter to counsel for Dr. Luke and his companies and counsel for Sony and Kemosabe Records seeking to clarify whether they intended to continue to try to enforce the exclusivity clauses against Kesha despite Dr. Luke and his companies' legal election to sue for damages. *See* Glandian Aff. Ex. A. And she received her answer: Yes. In her letter, Kesha proposed that she commence recording immediately with (Sony) RCA without any involvement of Dr. Luke and his companies. She also asked Dr. Luke and his companies to confirm they would not threaten or pursue litigation against a third party that became involved with Kesha, or at the very least, to provide notice to her if they at any point should decide to do so. Dr. Luke and his companies responded that her proposals were "fully rejected." They did not agree that Kesha is free to record with RCA; they did not agree to refrain from threatening or suing third parties that become involved with her; and they did not agree to provide notice before threatening or pursuing litigation against any such third parties at a later date. *See* Glandian Aff. Ex. B. Sony and Kemosabe were no better—they unreasonably maintained that Kesha is still bound by the exclusivity provisions. *See* Glandian Aff. Ex. C.

Kesha now faces an abysmal decision: work with her alleged abuser (as noted, the truth or falsity of the allegations of abuse are not at issue in this Motion), or idly and passively wait as her career tick-tocks away. She is precluded from working *in perpetuity* because the term of her contract can only be satisfied if she records three more albums. Kesha needs the Court's assistance. The law provides a remedy in cases like this: As explained in Kesha's Motion, she is entitled to a preliminary injunction keeping Dr. Luke and his companies out of her career so she can record with other parties because (i) she will suffer irreparable harm absent an injunction; (ii) Dr. Luke and his companies will suffer none so the balance of equities favors the injunction; and (iii) she is likely to succeed on the merits of the declaratory relief cause of action.[2]

Ultimately, later in this litigation, the Court should issue a declaration that the Agreements are no longer valid.[3] But until the litigation reaches that stage, Kesha needs the Court to issue a preliminary injunction restraining Dr. Luke and his companies from interfering with Kesha's recording career. Only then will she be able to pursue a career without him. Unless the Court steps in, there will soon be no career left to pursue.

LEGAL STANDARD

In deciding a motion for a preliminary injunction, irreparable injury to the moving party absent an injunction is of particular importance. Kesha submits this supplemental brief to present to the Court critical evidence of irreparable injury that was previously the subject of confusion in the record. *See* Glandian Aff. Exs. A, B, C. "[T]he object of a preliminary injunction is to prevent irreparable injury pending final ascertainment of the plaintiff's right to

[2] As noted, Kesha is not asking the Court to decide whether she is likely to succeed on the allegations of abuse, but merely whether she is likely to succeed on her first cause of action for *declaratory relief* by applying one purely legal principle: A plaintiff can continue to perform on a contract and solicit performance, or treat it as breached and sue for damages. Not both. Dr. Luke and his companies chose to treat the Agreements as breached and sue for damages. As such, they can no longer hold Kesha to their terms.

relief, but not to determine that right itself. Given this object, a court presented with an application for a preliminary injunction, provided that the plaintiff has established a prima facie right to the ultimate relief or judgment demanded, should give greater weight and consideration to the danger threatened and the consequences of not granting the application than to questions concerned with which the plaintiff will ultimately be able to prove his or her case." 67A N.Y. Jur. 2d Injunctions § 13 (2015).

In addition to considering whether there will be irreparable harm, the Court also considers whether the balance of equities favors an injunction and whether the moving party is likely to succeed on the merits of his or her claim—here, whether Dr. Luke and his companies have treated the Agreements as terminated and sought damages. *See Reichman v. Reichman*, 88 A.D.3d 680 (2d Dept 2011).

"With a banner of discretion waving over the field of injunctions, pragmatism is the theme. This tends to prevent any single factor, no matter what its individual dictate might be, from rejecting the injunction out of hand in the face of countervailing considerations." Siegel, N.Y. Prac. § 328 (5th Ed. 2015). "Everything is relative, even in the law of preliminary injunctions." *Id*. Because Kesha faces a grave danger of irreparable harm and Dr. Luke and his companies would suffer no harm from an injunction, her Motion should be granted.

ARGUMENT

I. Kesha Will Suffer Irreparable Harm if the Preliminary Injunction Is Not Granted.

Even though the Agreements can no longer be enforced against Kesha and she is free as a matter of law, in reality, she still cannot work because, without a court order (injunction or declaration), the major record labels know there are standard exclusivity provisions that RCA, Dr. Luke, and his companies continue to enforce. Dr. Luke made clear his intention to enforce

[3] If, to the contrary, the Court ultimately finds against Kesha, Dr. Luke and his companies

the exclusivity provisions in his attorney's letter to Kesha's counsel. In the letter, he (1) rejected her proposal that she record with RCA without his involvement, (2) refused to agree that he would refrain from threatening or suing third parties that became involved with her, and (3) refused to agree to provide notice to Kesha if at any point he decided to do so. Glandian Aff. Ex. B.

As explained in Kesha's Motion and the supporting affidavits, Dkt. Nos. 329-34, if Kesha does not work soon, she may never work again. Jim Urie, former President and CEO of Universal Music Group Distribution with over 40 years' experience in the music industry, explained that this is an industry that "caters to youth and novelty." Urie Aff. ¶ 3. "The window of opportunity for a young recording artist has always been narrow, and is narrower today than ever before . . . ." *Id*. "Kesha's window of opportunity is nearly shut: she has not been recording, touring, or able to market merchandise for nearly a year—an eternity in the industry. If Kesha is not permitted to resume working immediately with the backing of a major record label, her window will forever close. This is so because the music industry, including the distribution arm, is fickle and opportunities are fleeting. No mainstream distribution company will invest the money necessary to distribute songs for an artist who has fallen from the public eye, as is happening to Kesha at this very moment. Accordingly, if Kesha cannot immediately resume recording and having her music promoted, marketed, and distributed by a major label, her career is effectively over." Urie Aff. ¶ 6.

As explained in Kesha's Motion, courts have found irreparable harm where a young artist's career is sidelined in exactly this manner. *E.g.*, *Then v. Navarro*, 2015 WL 1878624, at *2 (N.Y. Sup. Apr. 17, 2015) (irreparable harm to young musicians who were "prevent[ed] from exploiting their current youth in a market that particularly values such fleeting commodity,"

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can easily be compensated by damages.

because "moment by moment . . . results in lost opportunity for status and fame for [the artists], which cannot be recouped, and which cannot adequately be compensated by money"); *Milstead v. O Records & Visuals, Ltd.*, 1984 WL 433, at *2 (S.D.N.Y. June 5, 1984) (irreparable harm to a recording artist if the record company was not restrained from interfering with the artist's negotiations and contractual relations with others during the pendency of the lawsuit, because "injury to [the artist's] career that will follow from his inability to produce new records during this litigation and the resultant decline in his public exposure clearly goes beyond any quantifiable lost earnings").

Dr. Luke himself admitted that Kesha will be harmed beyond repair. On multiple occasions, he told Kesha that if she is out of work for too long, her career will expire. In fact, he told her that he would be behind its destruction. Kesha testified, "I specifically remember him telling me that if I ever tried to get away from him for any reason that he would tie me up in litigation until my career was over. He seemed to bask in power and also stated that he would just drag his feet until I would be too old for anyone to care about. He made it very clear to me and my mom that he owned me and there was nothing I could do about it." Kesha Aff. ¶ 4. "Dr. Luke promised me he would stall my career if I ever stood up for myself for any reason." *Id*. ¶ 10.

And Dr. Luke has kept that promise. If he continues to wrongfully prevent Kesha from working, she will have no remedy at law, and certainly no remedy that is "plain, adequate, and complete, and from a pragmatic viewpoint as efficacious as" an order from this Court preventing Dr. Luke and his companies from further interfering with Kesha's career while this action is

pending. *See* Siegel, N.Y. Prac. § 328 (5th ed. 2015). As such, the Court should stop him now, before permanent damage is done.[4]

II. The Balance of Equities Favors a Preliminary Injunction.

As an initial matter, the equities favor an injunction because Kesha continues to suffer irreparable harm due to Dr. Luke's wrongful interference with her relationships with third parties, and an injunction would not cause comparable let alone any injury to Dr. Luke or his companies. *See* 67A N.Y. Jur. 2d Injunctions § 6 (2015) ("When threatened acts, if continued or accomplished, would [lead to] irreparable damage of the plaintiff, and the issuance of a preliminary injunction would cause only inconsequential damage to the defendant, the court should exercise its discretion to grant the injunction."); *see also Then*, 2015 WL 1878624, at *2 ("The equities surely weigh in favor of young musicians being enabled to use their talents to their fullest extent.").

In his affidavit attached to Kesha's Motion, Bob Ezrin, who has 45 years' experience in the music industry, explained that "although Kesha's recording career could be over if this stalemate does not come to a prompt end, Dr. Luke continues to flourish; a fact borne out by a simple review of popular songs today on billboard.com or similar sites." Ezrin Aff. ¶ 8. This litigation "will have little to no impact on the overall health of [Dr. Luke's] businesses." *Id*. But the Court need not take Ezrin's word for it. Dr. Luke and his companies' work history speaks for itself. During the pendency of this lawsuit, Dr. Luke and his companies have continued to

[4] Even should Dr. Luke represent to the Court that he is not interfering with Kesha's career—and that would be a lie—any such representation would not affect the outcome of Kesha's Motion. "An injured party need not wait until his rights have been destroyed in the circumstances disclosed by the evidence[;] if by reasonable expectation defendants' unlawful acts may produce such a result, equity will intervene." *Republic Aviation Corp. v. Republic Lodge, etc.*, 169 N.Y.S.2d 651, 668 (1957). And "even if the defendant has voluntarily ceased the offending conduct, the court may grant a preliminary injunction if it is likely that the offensive conduct will recur." Davis, Harry S., 3 N.Y.Prac., Com. Litig. in New York State Courts § 18:9 (4th ed. 2015) (citations omitted).

release record after record with other artists, while Kesha has been on ice. Dr. Luke's page on the website Discogs, www.discogs.com, shows 64 credits in 2014 and 2015, in fields including Writing & Arrangement, Production, Vocals, Instruments & Performance, and Technical. *See* Glandian Aff. Ex. D. Kesha's page shows one. *See* Glandian Aff. Ex. E.

To the extent Dr. Luke and his companies are injured by the granting of the preliminary injunction at all, any injury can easily be compensated by damages. *See Star Boxing v. Tarver*, 2002 WL 31867729, at *6 (S.D.N.Y. Dec. 20, 2002) (enforcing exclusivity agreement of boxer, whose "career is measured in years, not . . . in decades," because it would cause irreparable harm, while boxer's promoter could be compensated by money). In fact, by seeking only damages in their First Amended Complaint, Dr. Luke and his companies have agreed to this. *See Mar v. Liquid Mgmt. Partners, LLC*, 62 A.D.3d 762 (2d Dept 2009) (holding that by "seek[ing] nothing more than monetary damages," the party had "effectively acknowledged that [it would] be fully compensated by obtaining such damages").

Moreover, in balancing the equities, it is worth considering that this is a situation of Dr. Luke's making. As noted, he "promised" Kesha that he would destroy her career if she ever defied him. And now he is trying to do so. Kesha Aff. ¶¶ 4, 10.

But Kesha and Dr. Luke are not the only people who matter here, and they are not the only ones to consider when balancing the equities. "In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 A.D.3d 212, 223 (4th Dept 2009) (citations omitted); *see also, e.g.*, *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214 (1st Dept. 1987). Here, the interests of the general public favor granting the injunction. This case involves issues of rape, gender violence, and power, and the

world is watching. #FreedomforKesha has been trending on Twitter and Facebook—an expression of support for Kesha by thousands of people. Glandian Aff. ¶ 8. Since October 2014, there have been over 360 articles about this lawsuit and Kesha's California lawsuit that prompted it, including coverage by the *Los Angeles Times*, *The Hollywood Reporter*, *Chicago Tribune*, *USA Today*, *Newsday*, *Billboard*, and many other domestic and international sources. Glandian Aff. ¶ 9. In nearly all of them, the spotlight is on one critical and tragically relevant question: What happens to a woman who comes forward and reveals that she has been abused? No one can dispute that society has an interest in encouraging victims of sex crimes to report them. *See, e.g.*, *Fischetti v. Scherer*, 44 A.D.3d 89, 93 (1st Dept 2007). Kesha has done so. Dr. Luke's continued reliance on deposition testimony by Kesha is no better than a classic abuser relying on a recantation by his abuse victim. Prosecutors around the country still pursue these cases because they understand the imbalance of power in an abusive relationship. Kesha really needs the Court to help.[5]

Given the irreparable harm to Kesha, lack thereof to Dr. Luke or his companies, and powerful benefits to the public of allowing Kesha the autonomy to again release music, an injunction is necessary.

III. Kesha Is Likely to Succeed on the Merits of Her Declaratory Relief Cause of Action.

As noted in Kesha's Motion, on July 7, 2015, Kesha filed her Answer and Counterclaims in this litigation. Her first cause of action is a request for declaratory relief, asking the Court to declare that, *inter alia*, the Agreements have been terminated as a matter of law. Answer and

[5] Sony, for its part, is no better than Dr. Luke and his companies. In Sony and Kemosabe's Motion to Dismiss Kesha's Counterclaims, they too employ the blame the victim tactic: "Sebert cannot have it both ways: She cannot claim that Dr. Luke intimidated her into silence, then—as an apparent afterthought—seek to hold Sony and Kemosabe Records liable for failing to act on conduct that she did not report." Sony and Kemosabe Records Motion to Dismiss (Dkt. No. 328) at 2. This cavalier response to a woman's allegations of sexual assault is shocking and disgraceful.

Counterclaims 29-31; *see also* CPLR § 3001 ("The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.").

Kesha is likely to succeed on the merits of this claim because Dr. Luke and his companies elected to treat the contract as terminated pursuant to the election of remedies doctrine. When confronted with a defendant's breach, a plaintiff may "treat the entire contract as broken and sue immediately for the breach *or* reject the proposed breach and continue to treat the contract as valid." *Inter–Power of New York, Inc. v. Niagara Mohawk Power Corp.*, 259 A.D.2d 932, 934 (3d Dept 1999) (emphasis added). The party must "make an election and cannot at the same time treat the contract as broken and subsisting. *One course of action excludes the other.*" *Id*. (emphasis added) (internal quotation marks omitted); *see also Viacom Outdoor, Inc. v. Wixon Jewelers, Inc.*, 25 Misc. 3d 1230(A) (1st Dept 2009) (Under New York law, an alleged breach of contract "gives the non-breaching party two *mutually exclusive* options. It may elect to treat the contract as terminated and exercise [its] remedies, *or* continue to treat the contract as valid." (emphasis added)); *Plancher v. Katz*, 14 Misc. 3d 1218(A) (2005) (plaintiff elected to treat the contract as valid, and therefore could not treat it as breached).

For instance, in *Inter–Power*, the plaintiff elected to continue to treat the contract as valid and therefore could not obtain damages in a lawsuit for breach. After the defendant indicated that it viewed the contract between the parties as "null and void," the plaintiff responded with a letter explicitly disagreeing. The plaintiff advised the defendant "'both in writing and orally' that he believed that the underlying contract remained valid and enforceable." *Id*. at 934. The plaintiff then brought a lawsuit for breach of contract. The court held that when the defendant indicated it would not perform under the contract, the plaintiff was given the choice between

continuing to treat the contract as valid *or* bringing a lawsuit for breach. The plaintiff had chosen to treat the contract as valid, and therefore could not sue as if the contract were broken.

Here too, Dr. Luke and his companies faced a choice after Kesha allegedly breached the Agreements—treat the Agreements as valid and enforce them, or treat them as terminated and sue for damages. Dr. Luke and his companies' First Amended Complaint (the "FAC") makes clear their election: unlike the plaintiff in *Inter-Power*, they chose to "treat the entire contract as broken and sue immediately for the breach." The demand for damages and *not specific performance* makes this election clear, as do the specific allegations in the FAC.[6] Dr. Luke and his companies therefore cannot treat the Agreements as still valid and attempt to enforce their terms against Kesha.

CONCLUSION

For the foregoing reasons, this Court should grant Kesha's Motion for a Preliminary Injunction.

Dated: New York, New York
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Respectfully Submitted,

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[6] The FAC is replete with allegations that Kesha has repudiated the Agreements and breached their terms. *E.g.*, FAC ¶¶ 8, 45-46, 75. But it does not allege facts suggesting that Dr. Luke and his companies have attempted to enforce the contractual relationship with Kesha. There are no allegations of instances where someone tried to persuade her to perform and she refused to do so, and no expressions of intent to force her performance in the future.